L/afm **MAIL DATE: 4/17/06**

Decision 06-04-041 April 13, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Application of Pacific Gas and Electric Company (U 39-E) for Adoption of its 2006 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement and for Approval of Its 2006 Ongoing Competition Transition Charge (CTC) Revenue Requirement and Rates. | Application 05-06-007 (Filed June 1, 2005) |

# ORDER DENYING REHEARING OF DECISION (D.) 05-12-045

## I. SUMMARY

In this decision we dispose of an application filed jointly by Merced Irrigation District and Modesto Irrigation District ("Applicants") for rehearing of Decision (D.) 05-12-045 ("Decision"). In the Decision, we adopted the 2006 revenue requirements for Pacific Gas and Electric Company's ("PG&E's") Energy Resource Recovery Account ("ERRA") and ongoing (or "tail") Competition Transition Charge ("CTC"). Among other things, we reaffirmed that tail CTC would be calculated based on the costs specified in Public Utilities Code section 367(a)(1)-(a)(6).[1] This methodology, referred to by parties as the "statutory" methodology for calculating tail CTC, had previously been determined to be the proper method for calculating ongoing CTC in PG&E's 2004 and 2005 ERRA/tail CTC applications.

Applicants filed a timely application for rehearing challenging the Decision on the following grounds: Applicants challenge the Decision on the following grounds:

[1] Unless otherwise specified, all statutory references are to the Public Utilities Code.

(1) use of the statutory methodology to calculate ongoing CTC for all customers is not supported by prior Commission decisions; (2) the statutory methodology is inconsistent with Public Utilities Code section 367(b); and (3) the adopted ongoing CTC amount for departing load customers is discriminatory and violates Public Utilities Code sections 453 and 368. We have carefully considered these arguments and are of the opinion that Applicants have failed to demonstrate legal error. Accordingly, rehearing of D.05-12-045 is denied.

## II. DISCUSSION

### A. D.05-12-045 is consistent with prior Commission decisions.

In its ERRA application, PG&E proposed two methods for calculating tail CTC – a "total portfolio" method for bundled and direct access ("DA") customers and a "statutory" method for departing load ("DL") customers.[2] (See Exh. 1, pp. 7-4 to 7-7.) However, prior Commission decisions had determined that the statutory method should be used to calculate ongoing CTC for all customer types. (See *Order Modifying Resolution E-3831 and Denying Rehearing of Resolution, as Modified* [D.05-01-035, p. 3 (slip op.)] (2005) __ Cal.P.U.C.3d __; *Order Modifying Decision (D.) 05-02-040 and Denying Rehearing of the Decision, as Modified* [D.05-10-047, p. 3 (slip op.)] (2005) __ Cal.P.U.C.3d __; *Order Denying Rehearing of Decision (D.) 05-01-031* [D.05-10-046, p. 5 (slip op.)] (2005) __ Cal.P.U.C.3d __.)[3] In contrast, the total portfolio method was

[2] Applicant's rehearing application concern a specific subset of DL customers, those who depart IOU service for publicly-owned utility service. These customers are referred to as municipal departing load ("MDL") customers.

[3] D.05-01-031 adopted PG&E's 2004 ERRA/ongoing CTC revenue requirements, and D.05-02-040 adopted PG&E's 2005 ERRA/ongoing CTC revenue requirements. On November 23, 2005, Applicants filed a petition for writ of review challenging the lawfulness of D.05-01-031, D.05-02-040, D.05-10-046 and D.05-10-047. This case is *Modesto Irrigation District et. al v. California Public Utilities Commission*, Case No. F049265 and is currently pending before the Fifth Appellate District of the California Court of Appeal.

used to calculate the indifference cost component of the customer responsibility surcharge ("CRS") and had "no bearing on the calculation of ongoing CTC." (D.05-12-045, p. 17.) Therefore, the Decision reaffirmed that, consistent with these prior decisions, the proper method for calculating ongoing CTC for all customers was based on section 367(a)(1) – (a)(6). (D.05-12-045, p. 17.)

Applicants assert that since D.05-10-046 and D.05-10-047 denied rehearing of D.05-10-031 and D.05-02-040, respectively, the Commission adopted the total portfolio method for calculating ongoing CTC for bundled and direct access customers. Accordingly, they contend that the Decision's use of the statutory methodology to calculate ongoing CTC for all customers is not supported by these prior decisions. (Rhg. App., pp. 2-3.) This argument is without merit.

The Decision considered and rejected a similar argument raised by South San Joaquin Irrigation District ("SSJID") in its comments to the proposed decision. As the Decision pointed out, parties mistakenly believed that the total portfolio method was a way to calculate ongoing CTC for some customers, when that method was in fact used to calculate the indifference cost component of the CRS. (D.05-12-045, p. 17.) Moreover, each of the decisions cited by SSJID (and by Applicants in this application for rehearing) "explicitly states that the statutory method should be used to determine ongoing CTC." (D.05-12-045, p. 20.) Applicants have not presented any new arguments that have not already been addressed by the Decision. Accordingly, we find no basis for granting rehearing.

Applicants also cite to D.05-01-035 to support their claim that the Commission had previously approved two different methodologies to calculate ongoing CTC. (Rhg. App., p. 3.) This reliance is misplaced. That decision specifically states that the total portfolio methodology is not another way to calculate ongoing CTC, but is used to calculate the indifference costs of the CRS. (See *Order Modifying Resolution E-3831*

*and Denying Rehearing of Resolution, as Modified* [D.05-01-035], *supra*, at p. 3.) Further, it explains that this methodology is not inconsistent with section 367 because:

> "the applicability of the total portfolio methodology depends on whether the customer is paying the [DWR] power charge. Regardless of whether they are bundled, direct access or departing load customers, when a customer pays the [DWR] power charge, the total portfolio calculation applies. When a customer does not pay the power charge, e.g. continuous DA customers and certain excepted [Customer Generation Departing Load] customers, the calculation does not apply. *However, in either case, the calculation of the tail CTC is based on the Public Utilities Section 367(a)(1)-(6) requirements.*"

(*Id.* (emphasis added).) Thus, Applicants' assertions are unsupported and there is no basis for granting rehearing.

### B. The adopted methodology for calculating ongoing CTC is consistent with section 367(b).

Applicants next assert that the Decision improperly relies on D.05-10-046 in concluding that the provisions of section 376(b) do not apply to the calculation of ongoing CTC. (Rhg. App., pp. 3-4.) They maintain that the reference to December 31, 2001 in section 367(b) concerns market valuation and "the netting called for in [section] 367(b) extends as long as ongoing CTC is collected." (Rhg. App., p. 4.) We disagree.

Section 367(b) concerns the recovery of uneconomic transition costs incurred on or before December 31, 2001 (i.e., "regular CTC"), and does not address the recovery of ongoing CTC. In contrast, section 367(a)(1) – (a)(6) lists the costs which may be recovered after December 31, 2001 and contains specific limitations on recovery of these costs. To apply the netting provisions of section 367(b) would result in rendering these limitations meaningless. Such a result would be contrary to the rules of statutory construction. (See, e.g., *People v. Garcia* (1999) 21 Cal.4$^{th}$ 1, 8; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.) Further,

> "the reference [to market valuation], in § 367(b), requires that calculation of the amount of transition costs eligible for recovery be based in part on market valuation of certain

> assets. But, costs eligible for recovery and that might otherwise have been 'subject to valuation' (§ 367(b)) consisted only of costs associated with generation assets that 'may become uneconomic as a result of [the transition to] a competitive market.' (§ 367.) As discussed above, such potentially uneconomic costs within the meaning of AB 1890 -- including § 367 -- no longer exist."

(*Opinion Regarding End of Rate Control Period and Valuation of Generation-Related Assets* [D.04-01-026, p. 14 (slip op.)] (2004) __ Cal.P.U.C.3d __.) Consequently, "with the disappearance of transition costs [as a result of the enactment of Assembly Bill 6X[4]], nothing exists to trigger [section 367(b)'s] application." (*Id*.) Therefore, even if the provisions of section 367(b) did extend to the calculation of ongoing CTC (which it does not), the netting provisions of that section are no longer applicable.

Applicants also cite to *Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation* [D.95-12-063] (1995) 64 Cal.P.U.C.2d 1, 58-60, for the proposition that the prior Commission decisions had concluded that netting of above and below market values applies to all transition costs, including ongoing CTC. (Rhg. App., p. 3.) This assertion has no merit. The language cited by Applicants applies only to regular CTC, not ongoing CTC. Indeed, subsequent Commission decisions further indicate this to be the case. For example, in *Re Pacific Gas and Electric Company* [D.97-06-060] (1997) 72 Cal.P.U.C.2d 737, 747, we discussed transition costs and noted:

> "Costs of generation-related assets and obligations must be collected by December 31, 2001.
>
> . . .

[4] Assembly Bill 6 of the First Extraordinary Session ("AB 6X") prohibited divestiture of "a facility for the generation of electricity owned by a public utility" prior to January 1, 2006. (Legis. Counsel's Dig., Assem. Bill No. 6 (1999-2000 1st Ex. Sess.), p. 96.) AB 6X also amended various statutes to delete references to market valuation of utility-owned generation assets. (Stats. 2001 (1st Ex. Sess.), ch. 2, §§ 2 & 3.)

> Most importantly, in order to determine the transition costs for generation-related assets, we must net the negative (above-market) and positive (below-market) transition costs of all utility-owned generation-related assets. Valuation of these assets must occur by year-end 2001."

Therefore, there is no basis to conclude that we had ever intended to net above and below market values when calculating ongoing CTC. Moreover, as explained above, to do so would be contrary to section 367(a)(1) – (a)(6), which contains specific limitations on the amount of ongoing CTC costs to be recovered.

### C. Adoption of the same ongoing CTC amount for all MDL customer classes does not constitute unlawful discrimination.

PG&E proposed in its 2006 ERRA application that ongoing CTC be allocated among all classes of MDL customers on an equal cents per kWh, and that ongoing CTC be allocated among bundled and direct access customer classes based on the Rate Design Settlement Agreement adopted in D.04-02-062. (Exh. 1, pp. 7-4 & 7-5.) The Decision adopted this proposal upon a finding that PG&E's proposal was "unopposed, supported by unrebutted testimony, and consistent with Commission precedent." (D.05-12-045, p. 23.)

Applicants contend that adopting the same ongoing CTC amount for all classes of MDL customers, rather than allocating ongoing CTC by customer class, is discriminatory. (Rhg. App., p. 5.) Therefore, it maintains that the Decision violates sections 453 and 368. Essentially, Applicants are arguing that ongoing CTC for MDL customers should be allocated in a similar fashion as bundled and direct access customers. This assertion is without merit.

Section 453 prohibits public utilities from making or granting any preference or advantage or from establishing or maintaining any unreasonable difference "as to rates, charges, service, facilities, or in any other respect." However, "[a] showing that rates [or cost allocation] lack uniformity is by itself insufficient to establish that they are unreasonable and hence unlawful. To be objectionable, discrimination must 'draw an

unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges.' " (*Hansen v. City of San Buenaventura* (1986) 42 Cal.3d 1172, 1180; see also *International Cable T.V. Corp. v. All Metal Fabricators, Inc.* (1966) 66 Cal.P.U.C. 366, 382 [discrimination by a public utility "refers to partiality in the treatment of those in like circumstances seeking a class of service offered to the public in general."].) In this instance, there is no unlawful discrimination because MDL customers are not similarly situated to bundled and direct access customers. For example, bundled and direct access customers receive certain services from the IOUs, whereas MDL customers no longer do upon their departure from bundled service. Therefore, adopting the same ongoing CTC amounts for all classes of MDL does not violate section 453.[5]

Adoption of a single ongoing CTC amount for all classes of MDL is also not contrary to section 368. As explained in D.05-10-046, the methodology for calculating ongoing CTC does not deviate based on the type of customer (bundled, direct access or departing load). (*Order Denying Rehearing of Decision (D.) 05-01-031* [D.05-10-046], *supra*, at p. 5 (slip op.).) Further, section 368(b) states that "[t]he separation of . . . components required by this subdivision shall be used to ensure that customers of the electrical corporation who become eligible to purchase electricity from suppliers other than the electrical corporation pay the same unbundled component charges, other than energy, that a bundled service customer pays." (Pub. Util. Code, §368, subd. (b).) Read properly, the statute simply requires that ongoing CTC be

[5] In their comments on the proposed decision, Applicants state: "Since the Proposed Decision relies upon one method to calculate [ongoing] CTC based upon [section] 367(a)(1)-(6), Merced/Modesto assume the Proposed Decision also intends to apply [cost allocation] consistently across [customer] classes regardless of whether they are bundled, direct access or departing load." (*Comments of Merced Irrigation District and Modesto Irrigation District on the Proposed Decision Mailed on November 15, 2005*, filed December 5, 2005, p. 5.) Applicants provide no authority why the methodology for calculating ongoing CTC dictates how ongoing CTC would be allocated across customer classes. Further, as noted above, the Commission adopted an equal cents per kWh methodology for allocating PG&E's 2004 and 2005 ongoing CTC revenue requirements among all classes of MDL customers. Applicants have presented no persuasive reasons why the Commission should now adopt a different methodology for allocating ongoing CTC among classes of MDL customers, nor presented any basis for how such an allocation should be determined.

calculated in the same manner for all customer types, not that each class of customer, regardless of type, be treated similarly. Accordingly, we find no basis for granting rehearing.

Finally, Applicants appear to raise an argument by noting their "concern" that incorporating the adopted ongoing CTC charge to calculate the CRS "may result in discriminatory treatment against MDL customers." (Rhg. App., p. 5.) Thus they assert that any disparate treatment would be unlawful. Applicants' arguments are speculative and the issue is outside the scope of this proceeding. As the Decision notes: "Issues related to the determination of [ ] CRS components [other than ongoing CTC] will be addressed in [the billing and collection phase of] R.02-01-011." (D.05-12-045, p. 19.) Therefore, Applicants' concerns should be raised and addressed in that proceeding.

## III. CONCLUSION

For these reasons, we conclude that Applicants have failed to demonstrate grounds for finding legal error.

Therefore, **IT IS ORDERED** that

1. Rehearing of Decision 05-12-045 is denied.
2. Application 05-06-007 is closed.

This order is effective today.

Dated April 13, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners